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In The Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, et al.,

Petitioners,

v.

SANDRA K. OMAR AND AHMED S. OMAR, as next friends of Shawqi Ahmad Omar,

Respondents.

MOHAMMAD MUNAF, et al.,

Petitioners,

v.

PETE GEREN, SECRETARY OF THE ARMY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF FORMER U.S. DIPLOMATS AND NATIONAL SECURITY SPECIALISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

Amici are former U.S. diplomats and national security specialists who have collectively participated in the creation and structuring of numerous multinational forces.[2] *Amici* deny that U.S. civilian courts are somehow divested of habeas jurisdiction to hear claims of U.S. citizens held abroad by U.S. armed forces in Iraq simply because those U.S. forces participate in an operation that carries a multinational label.[3] To the contrary, *Amici*'s hands-on experience with multinational forces confirms that the exercise of habeas jurisdiction by U.S. courts on behalf of American citizens challenging their detention by U.S. forces participating in the Multinational Force in Iraq is expected, legal, appropriate, and in no way presents the dire foreign affairs crisis suggested by the Government.

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] For a full listing of the qualifications of *amici*, *see* Appendix.

[3] *Amici* take no position on the scope of the injunctive relief ordered by the district court.

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SUMMARY OF ARGUMENT

Shawqi Omar and Mohammad Munaf are U.S. citizens being detained by U.S. soldiers under U.S. command in the Multinational Force in Iraq ("MNF-I"). Under United States and international law, they have a legal right to seek a writ of habeas corpus to challenge their detention. The Solicitor General argues that the MNF-I's multilateral affiliation effectively immunizes its actions from judicial scrutiny. Ironically, the Government suggests that MNF-I's mandate under international law somehow exempts it from clear international law obligations to recognize the availability of habeas corpus to detained prisoners.

The Solicitor General's brief claims that the mere act of U.N. authorization – without any meaningful change in U.S. command and control – automatically nullifies a U.S. citizen's right to a writ of habeas corpus. But U.S. habeas jurisdiction is an integral component of the existing system of U.S. command and control and bolsters its accountability. This is particularly true where, as here, the U.S. citizens being detained are being held in a U.S. military facility by U.S. armed forces commanded and controlled by U.S. military leaders.

In Iraq, the United States government remains fully responsible for the actions of its own soldiers toward its own citizens. Preservation of effective U.S. command and control does not preclude, but rather anticipates, that judicial accountability for illegal

detentions of U.S. citizens will be maintained through the exercise of civilian court habeas jurisdiction.

The Solicitor General's position is contrary to the established habeas rights of U.S. citizens, breaks with U.S. military and diplomatic practices, and is contrary to the overwhelming weight of international law and custom. *Amici* believe that United States foreign policy interests are ill-served by the claim that our country's military personnel should answer to no law, especially when the mere fact of U.N. authorization is cited to deny American citizens their day in court. This Court should hold that the act of U.S. participation in MNF-I does not suspend the right of United States citizens to the writ of habeas corpus.[4]

ARGUMENT

The Solicitor General claims that U.S. courts lack jurisdiction to review habeas petitions filed on behalf of U.S. citizens in any case where citizens are "held by a multinational force abroad *pursuant to international authority.*" Gov't Brief, at 12 (emphasis added). Yet this sweeping statement blurs the practical

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[4] To so hold, this Court need not decide whether and when habeas relief may be available in two other factual situations not presented here: when foreign nationals are detained by multinational forces under American command and control, or when American citizens are detained by multinational forces under the effective command and control of an international body.

differences among the various kinds of multinational forces abroad that operate pursuant to international authority. Contrary to the Government's suggestion, all MNFs are not equally "international." "In many ways traditional U.N. peacekeeping and U.N.-authorized military enforcement actions are at opposite ends of the spectrum of U.N. military involvement in a conflict zone."[5]

"Blue Helmet" peacekeeping forces under the aegis of the U.N. or other international organizations operate with troops voluntarily contributed by member states,[6] funded by their assessed contributions

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[5] Hilaire McCoubrey & Nigel D. White, THE BLUE HELMETS: LEGAL REGULATION OF UNITED NATIONS MILITARY OPERATIONS 19 (1996). The term "Blue Helmet" technically refers to the helmets worn by U.N. peacekeepers or peace enforcers carrying arms under the U.N. flag. John Hillen, BLUE HELMETS: THE STRATEGY OF U.N. MILITARY OPERATIONS 29-30 (2000). *Amici* use that term to describe all forces that operate analogously to U.N.-controlled operations by being effectively organized and commanded by international, intergovernmental bodies.

[6] Genuinely international forces usually enjoy meaningful participation from the militaries of many nations from the outset. *See, e.g.*, U.N. Mission in Haiti, *Facts and Figures*, http://www.un.org/Depts/dpko/missions/minustah/facts.html (detailing the multinational composition of the command structure and contributions of the nations involved). Even where one country contributes the majority of the soldiers to a Blue MNF, other participating countries still make significant contributions in the form of military force contributions, or logistical or technical support and funding. Crucially, the international body organizing the force appoints its commander and exercises actual operational control over personnel for the duration of the mission. *See infra*, note 7.

and under the control of a force commander appointed by the international organization.[7] By contrast, "Green Helmet" forces, even those that are authorized by the U.N. or other international organizations, are composed of troops not under U.N. control, but rather

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[7] Though force-contributing states in a typical U.N.-run coalition retain a measure of control over their contingents, especially with regard to the troop discipline, the rules of engagement and use of lethal force, the U.N.-appointed commander exercises command and control over most other significant operations. *See, e.g.*, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING 405 (2d ed. United Nations, 1990) ("A United Nations peace-keeping operation consists of a commander who is designated Force Commander ... and a number of contingents provided by selected Member States ... upon the request of the Secretary-General.... The military personnel of an operation, although remaining in their national service are, during the period of the assignment to the operation, international personnel under the authority of the United Nations and subject to the instructions of the [U.N.] commander, through the chain of command."). For example, the Secretary-General typically negotiates the status of forces agreement. *See* The Convention on the Safety of United Nations and Associated Personnel, Art. 4, G.A. Res. 51/137, 51 U.N. GAOR Supp. (No. 49), U.N. Doc. A/51/49 (Vol. I) (1996), *available at* http://www.un.org/law/cod/safety.htm ("The host State and the United Nations shall conclude as soon as possible an agreement on the status of the United Nations operation and all personnel engaged in the operation including, *inter alia*, provisions on privileges and immunities for military and police components of the operation."). In addition, the U.N.-appointed force commander reports directly to the Special Representative of the U.N. Secretary-General, who is in overall command of the mission. S.C. Res. 743, U.N. Doc. S/RES/743 (Jan. 31, 1992) (Croatia, Bosnia & Herzegovina); S.C. Res. 872, U.N. Doc. S/RES/872 (Jun. 22, 1993) (Rwanda).

under the "unified command" of one or more national militaries.[8]

By any measure, MNF-I is a Green Helmet force under effective U.S. command and control. Legal and historical precedents confirm that habeas jurisdiction attaches whenever U.S. forces acting as part of a multinational force exercise effective command and control over a detained U.S. citizen. Under those circumstances, detained U.S. citizens like Omar and Munaf do not forfeit their habeas rights.

I. The United States Government Is Responsible for the Actions of United States Forces Operating Under Its Effective Command and Control.

As diplomatic practitioners, *Amici* confirm that the general practice of the United States when participating in multinational military activities – whether or not

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[8] A recent example is the initial U.S. role in what became a multinational force in Afghanistan. Operation Enduring Freedom began with force command and control vested entirely with the U.S. *See, e.g.,* Nicolas Kredel, OPERATION "ENDURING FREEDOM" AND THE FRAGMENTATION OF INTERNATIONAL LEGAL CULTURE: COMPARING U.S. COMMON LAW AND CIVIL LAW PERSPECTIVES ON THE INTERNATIONAL USE OF FORCE 48-57 (2006) (describing the origination and management of Operation Enduring Freedom in Afghanistan). Additionally, Green Helmet operations of this sort differ in significant ways from Blue Helmet operations, in that they "operate[ ] with open-ended mandates and . . . undertake long-range planning and maintain autonomy." Paul F. Diehl, INTERNATIONAL PEACEKEEPING 134 (1993).

those activities are endorsed or authorized by the U.N. – is to form arrangements that leave undisturbed both U.S. command and control and the normal jurisdiction of U.S. military and civilian courts as part and parcel of that command and control.[9]

With respect to the Multinational Force in Iraq, three points are clear. First, the relevant question for this Court is not whether MNF-I generally acts under color of international authority, but *whether the MNF-I forces who detained Omar and Munaf are U.S. soldiers acting under effective U.S. command and control.* Second, the political, legal and historical record in Iraq shows that the United States deliberately arranged its participation in MNF-I so that only U.S. authorities would have command and control over all aspects of its armed forces, including the detention of prisoners. Third, under relevant law and practice, actions of United States forces operating under U.S. command and control in a UN-authorized MNF are legally attributable to the United States, not the United Nations. Where detention of U.S.

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[9] *See* Presidential Decision Directive 25, signed by President Clinton May 1994, reproduced in *United States Administration Policy on Reforming Multilateral Peace Operations*, 33 I.L.M. 795, 798 (1994) (stating that "the President ... will never relinquish command authority over U.S. forces" and will "consider placing appropriate U.S. forces under the operational control of a competent U.N. commander for specific U.N. operations authorized by the Security Council"). It appears that this policy directive was never rescinded by the subsequent administration.

nationals is at issue, United States officials remain fully accountable to a U.S. civilian court through the writ of habeas corpus.

A. The structure, operation and legal history of the MNF-I confirm that the U.S., not the U.N., exercises command and control over MNF-I operations.

From the first presence of U.S. troops on Iraqi soil in March of 2003, the U.S. has expressly and repeatedly confirmed its national command and control over U.S. forces in Iraq, and the U.N. has affirmed this policy choice. In many multinational military interventions, an international civilian entity is created to take over control of a troubled country at the time of the introduction of military forces. In Iraq, however, the initial invasion and occupation of Iraq by the U.S. and U.K. occurred in the Spring of 2003, without U.N. authorization.

The U.S. maintained the firm position that Security Council authorization would not displace the preexisting command structure that placed U.S. CENTCOM in effective and ultimate control. In the two months between occupation and U.N. recognition,[10] the U.S. expressly asserted command and control of coalition troops in accordance with its

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[10] *See* S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

unique role as occupying power.[11] And in September 2003, in anticipation of the Security Council's authorization of MNF-I, then-Secretary of State Colin Powell said that "the U.S. will remain the commander of the unified command. . . ."[12]

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[11] In a May 8, 2003 letter to the President of the U.N. Security Council, the Permanent Representatives of the U.K. and U.S. declared that the United States will act "under *existing command and control arrangements* through the Commander of Coalition Forces," a U.S. military commander. Letter to the President of the Security Council, U.N. Doc. S/2003/538 (May 8, 2003) (emphasis added).

[12] Mark Matthews, *For U.N. Help, U.S. Promises Oversight Role*, BALT. SUN, Sep. 4, 2003, at 1A. Secretary Powell acknowledged that "there will be an element in the resolution that calls upon the United States as the leader of the military coalition to report on a regular basis to the United Nations, since it is a United Nations authorized multinational force, if the resolution passes," but he in no sense suggested that such a reporting requirement ceded any element of effective command and control to the United Nations. *Id.* Indeed, General Casey, commander of MNF-I testified that there was "no reporting chain that goes back to the United Nations" and that U.N. authorization had no effect on U.S. command and control of MNF-I operations. *See Nomination of General George W. Casey, Jr., USA, for Reappointment to the Grade of General and to be Commander, Multinational Force-Iraq: Hearing Before the S. Comm. On Armed Svcs.*, 108th Cong. (Jun. 24, 2004) (Statement of Gen. George W. Casey, Jr.); *The Imminent Transfer of Sovereignty of Iraq: Testimony Before the H. International Relations Comm.*, 108th Cong. (May 13, 2004) (statement of Lt. Gen. Walter L. Sharp, Director, Strategic Plans and Policy, The Joint Staff) ("[The MNF] is subordinate to General Abizaid as Commander, U.S. Central Command.").

In light of the United States's unambiguous position, the U.N. never sought to deploy Blue Helmet Forces or to exercise effective control over U.S. forces operating in Iraq under the auspices of MNF-I.[13] To the contrary, the text and history of the pertinent U.N. resolutions – along with the reports submitted pursuant thereto by the Secretary-General – demonstrate that the U.N. envisioned its own role in Iraq as a limited one that never purported to exert effective command or control over the MNF-I.

U.N. Security Council Resolution 1483 affirmed the authority and control of the Coalition Provisional Authority ("CPA") and the limited role of the U.N.

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[13] The absence of U.N. command and control over MNF-I is significant because when it so chooses, the United Nations plainly *does* have the power to create a Blue Helmet security force, comprised of multinational forces and subject to its effective command, under Chapter VII of the U.N. Charter. In 1978, for example, the U.N. Security Council established UNIFIL: "a United Nations interim force for Southern Lebanon for the purpose of confirming the withdrawal of Israeli forces, restoring international peace and security and assisting the Government of Lebanon in ensuring the return of its effective authority in the area, the Force to be composed of personnel drawn from Member States." S.C. Res. 425, U.N. Doc. S/RES/425, ¶3 (Mar. 19, 1978). UNIFIL is composed of peacekeeping forces from 27 different nations, and is headed by a Force Commander appointed by the Secretary-General, in addition to the Special Representative of the Secretary-General for Southern Lebanon. The Security Council has extended UNIFIL's mandate numerous times since 1978; its current mandate ends in August 2008.

itself.[14] Resolution 1483 recognized " . . . the specific authorities, responsibilities, and obligations under applicable international law of those states [i.e. the U.S. and the U.K.] as occupying powers under unified command. . . ." Unified command over any security operations was placed in the hands of the United States,[15] while the U.N. was afforded a carefully defined "role in humanitarian relief, the restructuring of Iraq, and the restoration and establishment of national and local institutions for representative governance." S.C. Res. 1483, ¶5, U.N. Doc. S/RES/1483 (May 22, 2003).

The Security Council never sought to exercise authority or control over the CPA.[16] The U.N.

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[14] The Coalition Provisional Authority was set up by occupying U.S. forces in April 2003 and functioned as a stand-in for an Iraqi government until June 2004. Rajiv Chandrasekaran, *Ties to GOP Trumped Know-How Among Staff Sent to Rebuild Iraq*, WASH. POST, Sep. 17, 2006, at A1. During this period, it remained a funded branch of the U.S. Department of Defense, with its American administrators, Lt. Gen. Jay Garner and L. Paul Bremer, reporting directly to Secretary of Defense Donald Rumsfeld. *See* Mike Allen, *Expert on Terrorism to Direct Rebuilding*, WASH. POST, May 2, 2003, at A1.

[15] Resolution 1546 specifies that the entire MNF-I serves under the "unified command" of the U.S. S.C. Res. 1546, ¶10 at 4, U.N. Doc. S/RES/1546 (Jun. 8, 2004).

[16] In fact, the opposite is true: the U.N., lacking a security force of its own, relied on negotiations with the United States as unified commander of the CPA and MNF-I to provide security for U.N. personnel in Iraq. *See, e.g.*, The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 124 of Resolution 1483 (2003) and Paragraph 12 of Resolution 1511 (2003)*,

(Continued on following page)

Secretary-General, in his first report made under Resolution 1483, acknowledged that command and control over security forces remained within the sole control of the CPA and that "executive law enforcement responsibilities are the sole responsibility of the [Coalition Provisional] Authority, under Resolution 1483 (2003) and international humanitarian law."[17]

Upon its creation in May 2004, the Green Helmet MNF-I expressly adopted the CPA's command and control structure that, as explained above, minimized U.N. oversight of multinational forces. *See* Coalition Provisional Authority Order Number 100, "Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority," CPA/ORD/28 (Jun. 2004). The MNF-I was created to replace the

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¶7, U.N. Doc. S/2004/625 (Aug. 5, 2004) ("The United Nations lacks the integral resources for the early discharge of its own security responsibilities in Iraq. Therefore, it will have to rely on the Interim Government of Iraq and the multinational force to provide its security."); The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 30 of Resolution 1546*, ¶21, U.N. Doc. S/2004/959 (Dec. 8, 2004) ("An agreement is being negotiated with the United States, as the State whose armed forces are vested with unified command of the multinational force, concerning protection by the multinational force of the United Nations presence in Iraq.").

[17] The Secretary-General, *Report of the Secretary-General pursuant to Paragraph 24 of Security Council Resolution 1483 (2003)*, ¶51, U.N. Doc. S/2003/715 (July 17, 2003). The Secretary-General considered but rejected the establishment of an international police force "*under United Nations auspices*" because he believed that to create a "*parallel system for law enforcement*" would not be effective. *Id.* (emphasis added).

security wing of the CPA, the Coalition Joint Task Force 7 (created on June 14, 2003), which had in turn replaced the Coalition Forces Land Component Command ("CFLCC"). At all relevant times, the Force Commander was a U.S. Army General.[18]

In three ways, U.N. Security Council Resolutions 1511 and 1546, adopted on October 16, 2003 and June 8, 2004, respectively, expressly refrained from asserting U.N. authority and control over MNF-I. First, the resolutions distinguished between the U.N.-led United Nations Assistance Mission for Iraq which would serve humanitarian functions, on one hand, and "a multinational force under unified command" to provide security enforcement, on the other. S.C. Res. 1511, ¶¶9, 13, U.N. Doc. S/RES/1511 (Oct. 16, 2003); S.C. Res. 1546 ¶¶7, 9, U.N. Doc. S/RES/1546 (Jun. 8, 2004). Second, the U.N. authorized the MNF-I because its presence "is at the request of the incoming Interim Government of Iraq," not because the MNF operated under U.N. Security Council auspices. *Id.* ¶9. That is, it is not U.N. action that renders the MNF-I's presence in Iraq lawful under international law. Nor did the U.N. assert the power to terminate the mandate of the MNF-I of its own accord – a power

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[18] *See* John Pike, *Coalition Joint Task Force 7 (CJTF 7)*, at http://www.globalsecurity.org/military/agency/dod/cjtf-7.htm. The CFLCC was commanded by Lt. Gen. David McKiernan, U.S. Army; CJTF-7 and MNF-I were commanded until the end of June 2004 by Lt. Gen. Ricardo Sanchez, U.S. Army, succeeded by Gen. George Casey, U.S. Army, and Gen. David Petraeus, U.S. Army, the present commander of MNF-I.

that it had expressly reserved for itself with respect to other multinational forces.[19] Third, the U.S. Government, as effective commander of the MNF – and not the Secretary-General or any other Member State – was given responsibility for reporting to the Security Council on the MNF's behalf. S.C. Res. 1511, *supra*, ¶25; S.C. Res. 1546, *supra*, ¶31.

Subsequent actions by the U.S. and the U.N. clearly show that Resolutions 1511 and 1546 only solidified U.S. control over MNF-I forces to the exclusion of any meaningful supervisory role by the U.N. The former U.S. commander of MNF-I operations repeated that there existed "no reporting chain that goes back to the United Nations."[20] Meanwhile, the U.S. has expressly declared that "U.S. and U.K. military forces retain legal responsibility for those prisoners of war and detainees in U.S. and U.K. custody respectively."[21]

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[19] *See, e.g.*, S.C. Res. 425, *supra*, at ¶2 ("The United Nations Interim Force [in Lebanon] shall be established . . . for an initial period of six months . . . It shall continue in operation thereafter, if required, provided the Security Council so decides.").

[20] *See Nomination of General George W. Casey, Jr., USA, for Reappointment to the Grade of General and to be Commander, Multinational Force-Iraq: Hearing Before the S. Comm. On Armed Svcs.*, 108th Cong. (Jun. 24, 2004) (Statement of Gen. George W. Casey, Jr.).

[21] Written Submission from the CPA to the U.N. High Commissioner for Human Rights, 28 May 2004, reproduced in THE OCCUPATION OF IRAQ: THE OFFICIAL DOCUMENTS OF THE COALITION PROVISIONAL AUTHORITY (2008) (Stefan Talmon, ed.).

In response, the U.N. has repeatedly cited its complete lack of control over those operations in a series of reports expressing concern over the potential illegality of the MNF-I's detention operations under international humanitarian law.[22] *See* The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 30 of Resolution 1546*, ¶72, U.N. Doc. S/2005/373 (Jun. 7, 2005) ("One of the major human rights challenges remains the detention of thousands of persons without due process. . . . Prolonged detention without access to lawyers and courts is prohibited under international law, including during states of emergency."). Human Rights Reports issued by the United Nations Assistance Mission in Iraq (UNAMI) have registered increasing alarm over the potentially illegal conditions of MNF-I detention. *See* U.N. Assistance Mission for Iraq, *Human Rights Report for the Period Nov. 1 – Dec. 31, 2005*, http://www.uniraq.org/documents/HR%20Report%20Nov%20Dec%2005%20EN.PDF (warning that holding detainees without access to judicial review is a violation of international law).

In sum, the U.S. has repeatedly confirmed that in Iraq, it, and not the U.N., exercises sole command and control over MNF-I detention operations. The

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[22] The Secretary-General has expressly called for the Multinational Force to act in accordance with international humanitarian and human rights law. *See, e.g.*, The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 30 of Resolution 1546 (2004)*, U.N. Doc. S/2006/360 (Jun. 2, 2006).

same U.S. command and control assumes the judicial accountability, not the immunity, of U.S. officials for claimed illegality arising out of those U.S.-controlled operations.

B. The U.S. exercises effective command and control over all aspects of MNF-I detention operations.

The policies and practices of MNF-I detention operations make clear that it is the U.S. – not the U.N. or the Interim Government of Iraq (I.G.I.) – that exercises effective command and control over the detention of individuals in the custody of U.S. troops in Iraq.

Coalition Provisional Authority Memorandum 3 and Order 99 provide for the basic structure of detention operations of national forces operating under the MNF-I umbrella. *See* Coalition Provisional Authority Memorandum 3, "Criminal Procedures." CPA/MEM/27 (Jun. 3, 2004); Coalition Provisional Authority Order 99, "Joint Detainee Committee," CPA/ORD/99 (Jun. 27, 2004). These documents empower each "national contingent of the MNF" to apprehend, detain, and classify internees for up to 18 months without any oversight of the U.N., I.G.I., or cooperating national contingents.

CPA 3 creates two categories of detainees: criminal detainees and security internees. Criminal detainees are "persons who are suspected of having committed criminal acts"; security internees are

persons detained for "imperative reasons of security." S/RES/1483 at §5(1). MNF-I national contingents have the "right to apprehend" both types of persons. *Id.* at §5(1), §6(1).[23]

In elaborating upon the structure provided by CPA Order 3, the U.S. MNF-I detention operation has placed final authority to detain or release an internee in the hands of a U.S. official, with no oversight or review from an alternate sovereign or organization. In 2004, a body called the Combined Review and Release Board (CRRB) was established, comprising two representatives each from the Iraqi ministries of Justice, the Interior, and Human Rights and three MNF officers. News Release, U.S. CENTCOM, *Detainee Release Board Reviews 300 Cases During First Week*, Aug. 30, 2004, *available at* http://www.globalsecurity.org/wmd/library/news/iraq/2004/08/iraq-040830-centcom01.htm. This body is responsible for periodic review of the detainee's status. But the CRRB only possesses the

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[23] A detainee is afforded differing procedural rights dependent upon his classification. A criminal detainee has the right against self-incrimination, to consult an attorney, to be advised of the charges against him, and to be brought before a judicial officer no later than 90 days from date of induction into the detention center. *Id.* at §5(1)(a)-(d). A security internee has no right to counsel. Each security detainee receives review at six month intervals, *id.* at §6(1)-(5), and any application over continued detention over 18 months must be made to the Joint Detention Committee, which is composed of Iraqi and U.S. officials. *Id.* at §6(6); CPA/ORD/99, §2(1). As explained above, however, ultimate authority to detain or to release rests with the U.S. command.

power to make recommendations regarding a detainee's status. "The final approval for all releases rests with the MNF's Deputy Commanding General for Detainee Operations[.]" *Id.* Ultimate authority to release a detainee rests with the U.S., and the decision to release or continue detention at this highest level is non-reviewable.[24]

The practice of U.S. MNF-I detention reinforces the formal arrangements that places the U.S. in full and effective control of U.S. detention in Iraq. "In a real sense, the strength of a criminal case begins and ends with [coalition forces]." Maj. W. James Annexstad, *The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants*, ARMY L. 72, 75 (Jul. 2007) (describing that the decisions to apprehend, detain, charge, classify, and transfer a detainee are made by U.S. Task Force 134 before Iraqi authorities are contacted); *see also,* Walter

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[24] The structure of U.K. MNF-I detention, held by the *Al-Jedda* court to be in the effective control of the U.K., is parallel to that of the U.S., with a British Divisional Internment Review Committee ("DIRC"), which shares responsibility for detention review with a Combined Review and Release Board ("CRRB") composed of Iraqi and U.K. members. Committees on Defence and Foreign Affairs, *Supplementary Memorandum from the Ministry of Defence* (Jan. 11, 2007), available at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmdfence/209/7011108.htm. Following reviews, the CRRB "makes recommendations to the DIRC for consideration." *Id.* As the U.K. Ministry of Defense made clear in a submission to the Select Committee on Defence, this system of review "mirrors the U.S. process, in which the CRRB's recommendations are considered by the Commanding General of MNF-I." *Id.*

Pincus, *U.S. Holds 18,000 Detainees in Iraq: Recent Security Crackdown in Baghdad Nets Another 1,000*, WASH. POST, Apr. 15, 2007, at A24 (quoting military spokesman attesting that the "initial decision to detain or release those arrested is made by a U.S. unit commander with the assistance of an Army lawyer.").

Further, any belief that the Iraqi presence on the CRRB transforms detention into a joint endeavor between Iraq and the U.S. is belied by the words of former Iraqi Minister of Justice, Abdul Hussein Shandal who stated, in reference to Iraqi participation in the CRRB process: "The representatives of the MNF in the committee have the rights and *all the authority* under the UN resolution." Mariam Karouny & Alastair Macdonald, *Iraqi Minister Slams U.S. Detention Policy*, REUTERS (Sep. 14, 2005) (emphasis added). He described detention by MNF-I forces as "overseen by the Multinational Force and . . . not in the control of the justice ministry." *Id.*

C. The U.S. Government bears legal responsibility under international law for the detentions at issue here.

When ascribing legal responsibility for the actions of troops engaged in multinational forces, the determinative test is "effective command and control." That test comports with the widely accepted rule of international law that the actions of forces such as the MNF-I – including detention of citizen

prisoners – are attributable to the force-contributing state – here, the United States – whose contingent exercises effective control over the actions at issue. The International Law Commission (ILC) and the U.N. Secretariat confirm that under relevant international law, a test of "effective control" determines when a national force bears legal responsibility for an MNF's actions.[25]

The International Law Commission's Draft Articles on the Responsibility of International Organisations make clear that U.N. authorization alone does not absolve a Member State of primary responsibility for the State's actions.[26] The ILC's authoritative

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[25] This Court has recognized the ILC as "[e]stablished by the United Nations General Assembly in 1947 to codify international law," and has often relied upon ILC opinions to inform its construction of treaties. *United States v. Louisiana*, 394 U.S. 11, 1623, 28 n.7 (1969); *see also United States v. Alaska*, 521 U.S. 1, 24-25 (1997) (relying upon ILC draft articles to illustrate meaning of Convention on the Territorial Sea and the Contiguous Zone). Article 13 of the United Nations Charter provides that the General Assembly shall initiate studies and make recommendations for the "progressive development of international law and its codification." U.N. Charter, art. 13, ¶4. Most of the major drafts of the ILC have been adopted as international conventions. International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, U.N. Doc. A/56/10 (2001).

[26] International Law Commission, *Responsibility of International Organizations: Titles and Texts of the Draft Articles 4, 5, 6 and 7 Adopted by the Drafting Committee*, U.N. Doc. A/CN.4/L.648 (May 27, 2004). The ILC's draft articles on Responsibility of International Organisations resulted from a request of the U.N. General Assembly in December 2001. G.A.

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commentary clarifies that "the decisive question in relation to attribution of a given conduct appears to be who has *effective control* over the conduct in question." International Law Commission, *Report to the General Assembly,* U.N. GAOR, 56th session, Supp. No. 10, U.N. Doc. A/59/10 (2004) (emphasis added).[27]

The U.N. Secretariat has articulated the same test of effective control for determining responsibility: "In joint operations, namely, those conducted by a United Nations peacekeeping operation and an operation conducted under national or regional command and control, *international responsibility lies where effective command and control is vested and practically exercised.*" U.N. Doc. A/CN.4/545, at ¶¶17-18 (Jun. 25, 2004) (emphasis added). The Secretariat further emphasized that "the Council itself or the United Nations as a whole cannot be held responsible for an unlawful act by the State conducting the operation, for the *ultimate test of responsibility remains*

Res. 56/82, ¶8, U.N. Doc. A/RES/56/82 (Dec. 12, 2001) ("[The General Assembly] [r]*equests* the International Law Commission, taking into account paragraph 259 of its report, to begin its work on the topic 'Responsibility of international organizations' and to give further consideration to the remaining topics to be included in its long-term programme of work, having due regard to comments made by Governments.").

[27] "The conduct of an organ of a state . . . that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization *if the organization exercises effective control over that conduct.*" International Law Commission, *Report to the General Assembly,* ¶109, U.N. Doc. A/59/10 (2004) (emphasis added).

'effective command and control.'" U.N. Doc. A/CN.4/556, at 46 (May 12, 2005) (emphasis added).

The House of Lords recently applied the effective control test to this very force, MNF-I, when it held that a U.K. national could bring an action in U.K. courts for actions by the U.K. forces in MNF-I. In *R. (on the application of Al-Jedda) v. Secretary of State for Def.*, [2007] U.K.H.L. 58, whose facts are strikingly parallel to the instant case, the appellant was detained by U.K. forces in MNF-I without trial or charge for over two years and successfully challenged his detention before the House of Lords. *Id.* at ¶¶1-3.

The majority cited the ILC in following the effective control test. *Id.* at 5. Lord Bingham, writing for the majority, applied a five-part test to determine whether the U.K. exercised effective control:

> Were UK forces placed at the disposal of the U.N.? Did the U.N. exercise effective control over the conduct of UK forces? Is the specific conduct of the UK forces in detaining the appellant to be attributed to the U.N. rather than the UK? Did the U.N. have effective command and control over the conduct of UK forces when they detained the appellant? Were the UK forces part of a U.N. peacekeeping force in Iraq?

Id. at ¶22.

Applying the effective control test, the House of Lords decided that MNF-I should be considered a Green Helmet force because: (1) The U.N. did not

dispatch coalition forces; (2) The Coalition Provisional Authority (CPA) was established by the U.S., not the U.N.; and (3) "at no time did the US or the UK disclaim responsibility for the conduct of their forces or the U.N. accept it. It cannot realistically be said that US and UK forces were under the effective command and control of the U.N." *Id.* at ¶23.

The House of Lords Decision in *Al-Jedda* supports a conclusion here that effective control of the U.S. soldiers in the MNF-I, resides with the U.S., not the U.N. *Al-Jedda*'s reasoning confirms that U.S. forces under effective U.S. command and control remain legally responsible for their actions. The U.S. retains full legal responsibility for detention of civilians such as Omar and Munaf without trial or charge.[28] Nowhere did the U.S. officials who created MNF-I evince the slightest intent to remove American forces under their command and control from U.S. judicial authority. Given that neither the U.S. nor the U.N. has ever stated any intent to disrupt U.S. command and control over MNF-I – and that

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[28] The House of Lords' reasoning is confirmed by *Behrami v. France and Saramati v. France, Germany and Norway*, 45 E.Ct. H.R. 1 (2007), where the European Court of Human Rights similarly relied upon the ILC's "effective control" test in analyzing the status of the multinational forces in Kosovo and attributing responsibility for their actions. As in *Al-Jedda*, the *Behrami* Court focused on who exercised effective command and control over the multinational force. In both cases, the Court concluded that the multinational NATO military force in Kosovo, KFOR, was under effective international control, not the control of the individual member states. *Id.* at 39.

maintaining judicial accountability plays a critical role in preserving that command and control – the jurisdictional reach of U.S. military and civilian courts over U.S. forces remains undiminished.

D. The structure of MNF-I detention operations precludes meaningful review of detention outside U.S. courts.

Absent the availability of habeas corpus in a U.S. federal court, the structure of MNF-I detention operations precludes alternative forms of meaningful review of detention of a U.S. citizen by a U.S. custodian in Iraq. Within the MNF-I detention scheme, an American citizen detained by U.S. forces in Iraq operating under the umbrella of the MNF-I may be detained indefinitely, without counsel, and without access to any independent or meaningful review of his classification as a "security internee."[29]

Similarly, should a U.S. citizen be labeled a "criminal detainee" at some point in his detention and later transferred to the Central Criminal Court of Iraq, that court will have no jurisdiction to review his

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[29] *See* Amnesty International, *Beyond Abu Ghraib: Detention and Torture in Iraq*, MDE 14/001/2006 (Mar. 6, 2006), http://asiapacific.amnesty.org/library/Index/ENGMDE140012006?open&of=ENG-IRQ (describing MNF-I procedures, including denial of opportunity to contest charges and lack of meaningful review by CRRB).

detention at the hands of the MNF-I.[30] Nor would a U.S. citizen detained by U.S. troops in Iraq have recourse to any alternate tribunals, such as the International Court of Justice ("ICJ") or the International Criminal Court ("ICC").[31]

The Solicitor General's position in this case, which would incapacitate the federal judiciary and leave U.S. citizens to be tried by foreign courts, cannot be squared with the U.S. Government's current reluctance to have U.S. citizens tried by such judicial bodies as the International Criminal Court. And it would be ironic indeed if member nations could invoke U.N. authorization to avoid judicial scrutiny of international human rights violations. As diplomatic practitioners, *Amici* have always assumed that the institutions of the U.S. government will exercise effective jurisdiction and control over its own military

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[30] CPA/MEM/03, §5(3) (establishing that Central Criminal Court of Iraq has no jurisdiction to review the legality of the detention at hands of MNF-I).

[31] For the ICJ to review Petitioners' detention, the U.S. would have to make an application against itself before the ICJ, as only states may be parties before that tribunal – a scenario that is both procedurally impossible and politically improbable. Statute of the International Court of Justice, art. 34, June 26, 1945, 59 Stat. 1055, 1059, T.S. No. 933 ("Only states may be parties in cases before the Court."). Moreover, neither Iraq nor the U.S. is a State Party to the Rome Statute, which leaves the ICC with no jurisdiction to review Omar and Munaf's claims of illegal detention. *State Parties to the Rome Statute of the ICC*, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp (last visited February 20, 2008).

personnel. It ill-serves United States foreign policy interests to claim that our country's military personnel answer to no law, especially when the mere fact of U.N. authorization is used to deny American citizens their day in court.

II. The Right of United States Citizens to the Writ of Habeas Corpus Under the U.S. Constitution Cannot Be Suspended Simply by Participation in a Multinational Force.

American participation in an international military force such as the MNF-I cannot suspend the Great Writ for U.S. citizens. To so hold would permit the executive to escape judicial review by fiat, a result anathema to the centuries-long history of habeas corpus. Instead, U.S. constitutional and military history teach that habeas jurisdiction attaches whenever U.S. forces – even those acting pursuant to international agreement – exercise effective command and control over a citizen detainee.

A. U.S. citizens held overseas under effective U.S. control are entitled to habeas corpus to challenge their detention.

American citizens held overseas by U.S. armed forces have a right to habeas corpus. "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other

parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Reid v. Covert*, 354 U.S. 1, 6 (1957) (plurality op.). For U.S. citizens held abroad, the only relevant jurisdictional inquiry is whether an *ultimate* custodian – here, the Secretary of the Army – is within the territorial jurisdiction of the district court. *Braden v. 30th Judicial Circuit Ct.*, 410 U.S. 484, 495 (1973).

The mere fact that the U.S. force detaining the petitioner operates pursuant to U.N. authorization does not suffice to divest a court of habeas jurisdiction. In *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the sister of a former U.S. soldier held in Korea sought habeas in the D.C. federal courts on behalf of her brother, challenging his court-martial for a crime allegedly committed while serving with the United Nations Joint Command (UNJC) in that country. Despite its name, the UNJC was a multinational operation both established and operated by the United States Government. Like MNF-I, the UNJC was a "joint operation," under the effective command of the United States military, which was by far the largest contributor of ground forces, naval power, and air power in Korea. Although undertaken on the recommendation of the U.N. and supported by 16 participating member-states, the U.S. Government exercised effective command and control over the

military effort there.[32] In granting the writ, this Court never suggested that U.N. authorization of the multinational operation somehow divested U.S. courts of habeas jurisdiction over a U.S. citizen held in the U.S. military's custody. *Id.*

B. *Hirota v. MacArthur* does not divest this court of habeas jurisdiction.

The Solicitor General's sole authority for his claim that "United States courts lack jurisdiction to review the detention [by US forces] of individuals held abroad pursuant to international authority" is *Hirota v. MacArthur,* 338 U.S. 197 (1949), a nine-sentence opinion that has never since been cited by this Court. In *Hirota,* Japanese war criminals challenged the authority of General Douglas MacArthur, Supreme Commander of Allied Forces, to establish the International Military Tribunal for the Far East (IMTFE) as well as its adequacy of process. Brief for the Petitioner, at 16-19, *Hirota v. MacArthur,* 338 U.S. 197 (1949). In refusing to entertain the habeas petition, the Court tersely stated that "*under the foregoing circumstances* the courts of the United

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[32] In fact, unlike MNF-I, U.N. authorization *preceded* the creation of the multinational force in Korea. *See* S.C. Res. 84, U.N. Doc. S/RES/84 (Jul. 7, 1950). Yet the composition and command structure of the UNJC showed that the United States retained effective control of its participating forces. Indeed, the United Nations "had no legal powers over or in respect of the Force." Finn Seyersted, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 121-22 (1966).

States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners" without articulating which of "the foregoing circumstances" were dispositive. 338 U.S. at 198 (emphasis added).

The Solicitor General overreads *Hirota* as "establish[ing] that United States courts lack jurisdiction to review the detention of individuals held abroad pursuant to international authority, including individuals held by United States forces acting as part of a multinational force." But *Hirota* established no such thing.

Congress alone – not the Executive, the U.N. or any other multinational body – has the power to suspend habeas corpus, and only then "in cases of rebellion or invasion." U.S. Const. art. I, § 9, cl. 2.[33] Nor can an executive agreement with foreign sovereigns authorize what the Constitution forbids.[34] These

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[33] *See, e.g.*, *Ex parte Bollman*, 8 U.S. 75, 101 (1807) ("If at any time the public safety should require the suspension of [habeas] . . . it is for the *legislature* to say so") (emphasis added); *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting on other grounds) ("[S]uspension must be effected by, or authorized by, a legislative act.").

[34] *See Reid*, 354 U.S. at 5-6 ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. . . . [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."). *See also Missouri v. Holland*, 252 U.S. 416, 432-34 (1929) (treaty cannot authorize national government "to do that which the Constitution forbids").

constitutional presumptions militate against reading *Hirota* so sweepingly. By the Government's logic, the Executive could unilaterally extinguish the habeas rights of U.S. citizens under U.S. control simply by entering into a multinational force agreement.[35] Nothing in *Hirota* authorized the Executive to carve out a habeas-free zone for U.S. citizens simply by entering into an accord with a foreign nation.

In *Hirota,* as here, the controlling "circumstances" cited as the basis for the Court's ruling were not – as the Government claims – whether there was an *international source of authority* for petitioners' detention, but rather, whether the U.S. exercised *effective command and control* over the detention. Although the United States played a leading role in the occupation and spearheaded the IMTFE, that tribunal was fundamentally international in its establishment and operations in ways that the MNF-I is plainly not.

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[35] The Government's claim that Congress' authorization of the use of military force to "enforce all relevant United Nations Security Council resolutions regarding Iraq," Authorization For Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § (3)(A)(2), 116 Stat. 1501 (2002), impliedly suspended Omar and Munaf's rights to habeas corpus violates this Court's requirement of "a clear indication that Congress intended that result." *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). There is not the faintest suggestion in the authorization's text or legislative history that Congress intended to suspend habeas corpus with this authorization. *Cf. Demore v. Kim*, 538 U.S. 510, 517 (2003) ("[W]here a provision precluding review is claimed to bar habeas review, the Court has required a particularly clear statement that such is Congress' intent.").

Unlike MNF-I, which was stamped *ex post facto* with U.N. legitimacy, General MacArthur's authority to establish the IMTFE grew from a series of international agreements that preceded its founding.[36] Once established, the IMTFE was fully multilateral in its operations. Unlike MNF-I, where US CENTCOM does not report to the U.N. or Iraq, prosecutions by the tribunal had to be multilaterally approved and General MacArthur had to consult with Allied powers before modifying decisions of the tribunal. Each of the eleven IMTFE judges represented a member of the Allied nations and the Charter allowed for any Allied nation to appoint an associate counsel to assist the Chief of Counsel. *Id.* Art. 8(b). The indictments filed in the IMTFE were issued jointly by all eleven nations. *See*

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[36] On December 27, 1945, the United States, the USSR, and the United Kingdom – with China's concurrence – established the multilateral Far Eastern Commission (FEC) to oversee Japan's compliance with the Treaty of Surrender. Comprising eleven nations, the FEC's functions included "formulat[ing] the policies, principles, and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished," and "review, on the request of any member, any directive issued to the Supreme Commander for the Allied Powers or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission." *Agreement of Foreign Ministers at Moscow on Establishing Far Eastern Commission and Allied Council for Japan*, 27 Dec. 1945, Art. II(A)(1),(2), Documentary Appendix, at 14, *Hirota v. MacArthur*, 338 U.S. 197 (1949) (Nos. 239, 240, 248). The FEC approved the establishment of the IMTFE, and each member state enjoyed the power to review and amend the IMTFE charter. Philip R. Piccigallo, THE JAPANESE ON TRIAL 10-11 (1980).

Indictment (lodged with the Tribunal on April 29, 1946), Documentary Appendix, at 49, *Hirota v. MacArthur*, 338 U.S. 197 (1949) (Nos. 239, 240, 248).

The Government notes that "the tribunal's rulings were subject to modification by [General MacArthur]." Gov't Brief, at 20. But the FEC required him to consult with the diplomatic representatives of each Allied nation before rendering a decision. Richard R. Minear, VICTOR'S JUSTICE 160-61 (1973). That provision was added to ensure that those nations exerted influence over the Supreme Commander and the U.S. Executive. As litigants recognized at the time, a judicial finding sustaining Hirota's complaints would have amounted to a judicial abrogation of the international tribunal and nullified U.S. commitments.[37] Based on this lengthy record of Allied involvement, the U.S. State Department certified in *Hirota* that

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[37] The National Lawyers Guild wrote in an *amicus* brief that

> A decision by the Supreme Court of the United States to review the determinations of the [IMFTE] would, by violating the consensual acts of the co-equal Allied national states, impair the legal structure for the occupation of Japan, and imply to other Allied national states, that the United States, speaking through its Supreme Court, now regrets its agreements with its co-equal Allies, and in reviewing the proceedings and determinations of the [IMTFE] is contravening the international agreements made with them.

Brief for the National Lawyers Guild as *Amicus Curiae* Supporting Respondents, *Hirota v. MacArthur*, 338 U.S. 197 (1949) (Nos. 239, 240, 248).

the IMTFE was an international, and not a domestic, tribunal, as did the IMTFE itself.[38]

Hirota thus stands only for the proposition that a U.S. court may not sit in habeas review of the rulings of a Nuremberg-like, international tribunal. Yet ignoring this history, the Solicitor General makes much of Justice Douglas's recognition that the FEC was required "to respect the chain of command from the United States Government to the Supreme Commander and the Supreme Commander's command of occupation forces." *Hirota,* 338 U.S. at 206 (Douglas, J., concurring). Yet the Government omits Justice Douglas's far more relevant conclusion that

> Our inquiry is directed not to the conduct of the Allied Powers but to the conduct of our own officials. . . . *If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least, the Constitution follows the flag. It is no defense for him to say that he acts for the Allied Powers.* He is an American citizen who is performing functions for our government. It is our Constitution which he supports and defends. If there is evasion or violation of its obligations, it is no defense that he acts for another nation. There is at present no group or confederation

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[38] Letter from the Acting Secretary of State, December 14, 1948, Documentary Appendix B, at 110-14, *Hirota v. MacArthur*, 338 U.S. 197 (1949) (Nos. 239, 240, 248).

> to which an official of this Nation owes a higher obligation than he owes to us.[39]

In a case where judicial interference would force the United States to backtrack on an international commitment, or constrain or usurp the authority of another state participant in an international tribunal, stronger foreign policy objections may exist to the assertion of habeas jurisdiction. But Omar and Munaf are being detained by a Green Helmet MNF subject to exclusive U.S. command and control. Maintaining the accountability of American officials in that MNF to the rule of law through American courts poses no similar foreign policy problem. As the House of Lords recognized in analogous circumstances, where, as here, U.S. forces possess the unchecked authority unilaterally to hold or release a U.S. citizen detainee, they can be judicially ordered to exercise that authority without offending any other state participating in the MNF.

C. Under international law, U.N. authorization does not immunize the United States from judicial accountability with respect to the detentions of Omar and Munaf.

Nor, finally, is there any basis under international law for the Solicitor General's claim that the act of U.N. authorization – without meaningful

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[39] *Id.* at 204.

change in U.S. command and control – can nullify a detainee's internationally recognized human right to a judicial evaluation of the lawfulness of his detention. Article 9 (4) of the International Covenant on Civil and Political Rights, to which the United States is a party, declares that "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." U.S. Ratification of International Covenant on Civil and Political Rights, 58 Fed. Reg. 45934, 45942 (Dep't of State Aug. 31, 1993).

Mere participation in MNF-I operation does not immunize United States personnel from legal responsibility pursuant to their own national judicial accountability mechanisms.[40] Entering the MNF-I did not disable preexisting national judicial accountability mechanisms that apply to Member States' actions within MNF enforcement arrangements. Moreover, even if conducted under U.N. authorization, when U.S. actions violate established human rights norms, such as the norms against torture or detention without judicial review, such actions are *ultra vires*, and

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[40] "In order to continue to contribute to security, the MNF must continue to function under a framework . . . in which the contributing states have responsibility for exercising jurisdiction over their personnel." S/RES/1546. *See also* Dan Sarooshi, INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS 63 (2005) ("The State cannot seek to escape responsibility for its own acts . . . by hiding behind the non-binding decision of an organization.").

cannot be attributable solely to the U.N., leaving the responsible force-contributing State above the law.

This is particularly true when a U.S. citizen is detained in a U.S. military facility under the unchecked and complete control of U.S. armed forces, and the MNF proposes to transfer the U.S. citizen to the jurisdiction of a foreign court that may not fully protect his internationally recognized human rights. Even if this Court were to agree with the Government that the MNF-I is a thoroughly international force, that assumption should equally compel the conclusion that the U.N. lacks authority to give MNF-I power to act contrary to international law. It would be ironic indeed if this Court were to construe MNF-I's mandate under international law to exempt participating U.S. officials from clear international obligations to respect the availability of habeas corpus for detained prisoners.

Justice Douglas, concurring in *Hirota*, prophetically wrote:

> I assume that we have no authority to review the judgment of an international tribunal. But if as a result of unlawful action, one of our Generals holds a prisoner in his custody, the writ of *habeas corpus* can effect a release from that custody. It is the historic function of the writ to examine into the cause of restraint of liberty. *We should not allow that inquiry to be thwarted merely because the jailer acts not only for the United States but for other nations as well.* . . . Tomorrow or next year an American citizen may stand

> condemned in Germany or Japan [or Iraq] by a military court or commission. If no United States court can inquire into the lawfulness of his detention, the military have acquired, contrary to our traditions, a new and alarming hold on us.[41]

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Appeals in *Omar*, reverse in *Munaf*, and remand both cases to the District Court for further proceedings.

Respectfully submitted,

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[41] *Hirota*, 338 U.S. at 202 (Douglas, J., concurring) (emphasis added).

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William Durch is a Senior Associate at the Henry L. Stimson Center in Washington. He served as Project Director for the Panel on United Nations Peace Operations in 2000 and Scientific Adviser to the U.S. Defense Threat Reduction Agency in 1999 and 2001. He is the coauthor of The Brahimi Report and the Future of Peace Operations (Stimson, 2003).

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APPENDIX: QUALIFICATIONS OF AMICI

Madeleine K. Albright served as Permanent Representative to the United Nations from 1993 to 1997 and as U.S. Secretary of State from 1997-2001. Dr. Albright is the first Michael and Virginia Mortara Endowed Professor in the Practice of Diplomacy at the Georgetown School of Foreign Service and the first Distinguished Scholar of the William Davidson Institute at the University of Michigan Business School. Dr. Albright is the Chairman of The National Democratic Institute for International Affairs and also serves on the Board of Directors of the New York Stock Exchange.

Stephen W. Bosworth is Dean of the Fletcher School of Law and Diplomacy at Tufts University. During his diplomatic career, he served as U.S. Ambassador to the Republic of Korea, U.S. Ambassador to the Philippines, U.S. Ambassador to Tunisia, Director of the State Department Policy Planning Staff, Principal Deputy Assistant Secretary for Inter-American Affairs, and Deputy Assistant Secretary for Economic Affairs. He has also served as Executive Director of the Korean Peninsula Energy Development Organization (KEDO) and President of the United States-Japan Foundation.

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Alan Kreczko served as acting Assistant Secretary of State for Population, Refugees and Migration from 2001 to 2002. He also served as Special Assistant to the President and Legal Adviser for the National Security Council from 1993 to 1997 and as Deputy Legal Adviser for the Secretary of State from 1988 to 1993.

James C. O'Brien, a Principal of the Albright Group LLC, served as Special Presidential Envoy for the Balkans from 2000 to 2001, as Principal Deputy Director of the State Department Policy Planning Staff from 1998 to 2000, and as a State Department official from 1989 to 2001.

Thomas R. Pickering served as the Under Secretary of State for Political Affairs from 1997 to 2001, and was the U.S. Ambassador and Permanent Representative to the United Nations from 1989 to 1992. A Career Ambassador, during his diplomatic career, he also served as Assistant Secretary of State for Oceans, Environment and Science, U.S. Ambassador to The Russian Federation, U.S. Ambassador to India, U.S. Ambassador to Israel, U.S. Ambassador to El Salvador, U.S. Ambassador to Nigeria, U.S. Ambassador to The Hashemite Kingdom of Jordan, and Executive Secretary of the Department and Special Assistant to the Secretary. He was also President of the Eurasia Foundation and Senior Vice President for International Relations of The Boeing Company 2001-2005 and is currently Vice Chairman of Hills & Co.

J. Stapleton Roy is Vice Chairman of Kissinger Associates, Inc. A Career Ambassador, he served as U.S. Ambassador to Indonesia, U.S. Ambassador to the Peoples' Republic of China, and U.S. Ambassador to Singapore. He also served as Assistant Secretary of State for Intelligence and Research, Executive Secretary of the Department and Special Assistant to the Secretary, and as Deputy Assistant Secretary for East Asian and Pacific Affairs.

Eric Schwartz served for eight years at the U.S. National Security Council, ultimately heading the White House office responsible for humanitarian and United Nations affairs. A visiting faculty member at Princeton University's Woodrow Wilson School of Public and International Affairs, he was also the UN Secretary General's Deputy Special Envoy for Tsunami Recovery, and in 2003 and 2004, he was the second-ranking official at the Office of the UN High Commissioner for Human Rights. Earlier in his career, he served as a Staff Consultant to the U.S. House of Representatives Foreign Affairs Subcommittee on Asian and Pacific Affairs, and as Washington Director of the human rights organization Asia Watch (now known as Human Rights Watch-Asia). Mr. Schwartz currently serves as Executive Director of the Connect US Fund.

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Strobe Talbott served as Deputy Secretary of State from 1994-2001, and Ambassador-at-large and Special Advisor to the Secretary of State for the former Soviet Union from 1993-1994.

Frank G. Wisner is Vice Chairman, External Affairs, at American International Group. A career diplomat with the personal rank of Career Ambassador, he previously served as Ambassador to India from 1994-1997. Additionally, he held the positions of Ambassador to Zambia (1979-82), Egypt (1986-91), and the Philippines (1991-92). Mr. Wisner has served in a number of positions in the U.S. government, including Undersecretary of Defense for Policy (1993-94), Undersecretary of State for International Security Affairs (1992-93), Senior Deputy Assistant Secretary for African Affairs (1982-86), and Deputy Executive Secretary of the Department of State (1977). During the course of his career, Frank Wisner served in the Middle East and South and East Asia. Today Mr. Wisner is a member of the Boards of Directors of American Life Insurance Company (ALICO), EOG Resources and Ethan Allen, as well as the boards of numerous non-profit organizations. He is an advisor to Kissinger McClarty Associates.